Emiprima Sdn Bhd v Wonderful Castle Sdn Bhd (in liquidation)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(A)-1256–07 OF 2022
HAS ZANAH MEHAT, CHE MOHD RUZIMA AND SEE MEE CHUN JJCA
26 JULY 2023

Companies and Corporations — Liquidators — Remuneration — Whether liquidator's claim for remuneration must be fair and reasonable — Whether liquidator had burden to justify amount claimed as remuneration by giving detailed explanation of work done — Whether it was insufficient for liquidator to merely claim entitlement to percentage of fees listed in Table C of Second Schedule of Companies (Winding-Up) Rules 1972 ('the CWR') based on amount realised from sale of company's assets — Whether sole dependence on CWR Table C percentages to compute remuneration would produce arbitrary, impractical and unfair result as liquidator's fees would then depend on size of estate and not on amount and quality of work actually done

Following the winding up of the respondent, the company's liquidator realised the sum of RM148,213,574.72 from the sale of its assets and then called for a meeting of creditors and contributories (the Committee of Inspection or 'COI') to approve a resolution to pay him RM9,296,304 as his fees based on the rates specified in Table C in the Second Schedule of the Companies (Winding-Up) Rules 1972 ('the CWR'). Except for the appellant, which held a 10% shareholding in the respondent, the other members of the COI approved the said resolution. Dissatisfied with the COI's decision, the appellant applied to the winding up court under s 479 of the Companies Act 2016 for a review of the liquidator's remuneration contending that the sum approved by the COI was not fair and reasonable in the circumstances of the case. The appellant said that apart from merely referring to the percentage rates in Table C, the liquidator had not shown what work he had done to justify such a hefty sum as his remuneration. The High Court dismissed the application holding that based on Table C, the liquidator was entitled to charge the RM9,296,304 as his fees and that it did not offend the principle of fairness and reasonableness. The instant appeal was against that decision.

Held, unanimously allowing the appeal, setting aside the High Court's decision and remitting the matter back to the High Court to determine a fair and reasonable amount as remuneration for the liquidator for work done:

(1) Once the winding up court was confronted with a minority contributory's challenge, under s 479(3) of the Companies Act 2016, against the COI's determination of the remuneration of a liquidator, the winding up court had a statutory duty to examine whether the remuneration was in fact fair and reasonable and thereafter to either confirm or vary the amount (see paras 28 & 33).

(2) The winding up court in the instant case took a simplistic approach in deciding the appellant's application under s 479(3) and had only considered two factors in holding that the sum claimed by the liquidator did not go against the principles of fairness and reasonableness — namely, the duration of the liquidator's appointment and the liquidator's explanation that the amount of his remuneration was based on the percentages listed in para 2 of Table C in the Second Schedule of the CWR (see para 29).

(3) In determining whether the remuneration of a liquidator was fair and reasonable, the court had a duty to consider all relevant factors and to scrutinise all facts placed before it, accepting nothing at face value. The burden was on the liquidator to prove that the amount he claimed as remuneration was fair and reasonable (see para 37).

(4) In the instant appeal, apart from giving a generalised description of the work he had done as liquidator for the respondent and submitting that his remuneration claim was based on the percentages listed in para 2 of Table C in the Second Schedule of the CWR which was in turn based on the amount realised from sale of the company's assets, no other material was put forward by the liquidator to justify his claim for RM9,296,304 as his fees. Without any detailed explanation or sufficient proof to justify such a hefty sum, the liquidator's claim calculated merely based on the percentages in Table C, was completely disproportionate (see paras 39–40).

(5) The liquidator's dependence on the percentages tabulated in Table C to justify his remuneration claim produced a result that was arbitrary, impractical and not fair as it resulted in an unnecessarily large figure of remuneration that did not reflect commercial reality. If the percentages listed in Table C were allowed to be used as an inflexible rule, it would cause a liquidator's remuneration to be solely dependent on the size of the estate and not on the merits of the work done — an unfair situation if a liquidator had to handle a company that had little or no assets at all (see para 41).

(6) The percentages listed in Table C should not be used as a matter of right. The enormous amount claimed by liquidator as his remuneration, based simply on the percentages given in Table C, was unwarranted. Confirming the amount of remuneration that was claimed without

sufficient justification went against the overriding principle of fairness and reasonableness and also bypassed the requirement for the liquidator to properly account for the actual work he had done (see para 42).

(7) The winding up court should not act as a 'yes man' or rubber-stamp in confirming any remuneration claimed by a liquidator. Even if a particular claim was unchallenged or had been approved by the COI, the court had a duty to scrutinise each and every claim for sanction by a liquidator or any application by minority contributories to confirm or vary a liquidator's remuneration and should not allow any claim that was unjustifiable or unexplained (see para 43).

(8) Given the circumstances in this appeal, the court below had misdirected itself In its application of the law and had committed a serious error in finding that the liquidator was entitled to charge a remuneration based on the percentages listed in Table C of the Second Schedule of the CWR without the liquidator having put forward sufficient material to justify the amount he had claimed. The matter therefore had to be remitted back to the High Court for a full exercise of taxation to determine a fair and reasonable amount of remuneration due to the liquidator for work done (see paras 44–45).

[Bahasa Malaysia summary

Berikutan penggulungan responden, penyelesai syarikat telah merealisasikan jumlah RM148,213,574.72 daripada penjualan asetnya dan kemudian memanggil suatu mesyuarat pemiutang dan penyumbang (Jawatankuasa Pemeriksaan atau 'COI') untuk meluluskan ketetapan bagi membayar beliau RM9,296,304 sebagai finya berdasarkan kadar yang dinyatakan dalam Jadual C dalam Jadual Kedua Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('KPS'). Kecuali perayu, yang memegang 10% pegangan saham dalam responden, ahli COI yang lain meluluskan ketetapan tersebut. Tidak berpuas hati dengan keputusan COI, perayu memohon kepada mahkamah penggulungan di bawah s 479 Akta Syarikat 2016 untuk semakan semula saraan penyelesai dengan berpendapat bahawa jumlah yang diluluskan oleh COI adalah tidak wajar dan munasabah dalam keadaan kes tersebut. Perayu menyatakan bahawa selain hanya merujuk kepada kadar peratusan dalam Jadual C, penyelesai tidak menunjukkan kerja yang telah dilakukannya untuk mewajarkan jumlah yang begitu besar sebagai saraannya. Mahkamah Tinggi menolak permohonan tersebut dengan memutuskan bahawa berdasarkan Jadual C, penyelesai berhak mengenakan bayaran RM9,296,304 sebagai finya dan ia tidak melanggar prinsip keadilan dan kewajaran. Rayuan semasa adalah terhadap keputusan tersebut.

Diputuskan, sebulat suara membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi dan menyerahkan semula perkara tersebut kepada Mahkamah Tinggi untuk menentukan jumlah yang adil dan munasabah

sebagai saraan bagi penyelesai untuk kerja yang dilakukan:

(1) Sebaik sahaja mahkamah penggulungan berhadapan dengan cabaran penyumbang minoriti, di bawah s 479(3) Akta Syarikat 2016, terhadap penentuan COI terhadap saraan penyelesai, mahkamah penggulungan mempunyai kewajipan berkanun untuk memeriksa sama ada saraan tersebut sebenarnya adil dan munasabah dan selepas itu sama ada untuk mengesahkan atau mengubah jumlah (lihat perenggan 28 & 33).

(2) Mahkamah penggulungan dalam kes semasa mengambil pendekatan yang mudah dalam memutuskan permohonan perayu di bawah s 479(3) dan hanya mempertimbangkan dua faktor dalam memutuskan bahawa jumlah yang dituntut oleh penyelesai tidak bertentangan dengan prinsip keadilan dan kewajaran — iaitu, tempoh pelantikan penyelesai dan penjelasan penyelesai bahawa amaun saraannya adalah berdasarkan peratusan yang disenaraikan dalam perenggan 2 Jadual C dalam Jadual Kedua KPS (lihat perenggan 29).

(3) Dalam menentukan sama ada saraan penyelesau adalah adil dan munasabah, mahkamah mempunyai kewajipan untuk mempertimbangkan semua faktor yang berkaitan dan untuk meneliti kesemua fakta yang dikemukakan di hadapannya, tidak menerima apa-apa pada nilai muka. Beban terletak pada penyelesai untuk membuktikan bahawa jumlah yang dituntutnya sebagai saraan adalah adil dan munasabah (lihat perenggan 37).

(4) Dalam rayuan semasa, selain daripada memberikan penerangan umum tentang kerja yang telah dilakukannya sebagai penyelesaian bagi responden dan mengemukakan bahawa tuntutan saraannya adalah berdasarkan peratusan yang disenaraikan dalam perenggan 2 Jadual C dalam Jadual Kedua CWR yang mana seterusnya berdasarkan jumlah yang direalisasikan daripada penjualan aset syarikat, tiada bahan lain dikemukakan oleh penyelesai untuk mewajarkan tuntutannya sebanyak RM9,296,304 sebagai finya. Tanpa sebarang penjelasan terperinci atau bukti yang mencukupi untuk mewajarkan jumlah yang besar tersebut, tuntutan penyelesai yang dikira hanya berdasarkan peratusan dalam Jadual C, adalah tidak berkadaran sama sekali (lihat perenggan 39–40).

(5) Kebergantungan penyelesai pada peratusan yang dijadualkan dalam Jadual C untuk mewajarkan tuntutan saraannya menghasilkan keputusan yang rawak, tidak praktikal dan tidak adil kerana ia menghasilkan angka saraan besar yang tidak wajar yang tidak mencerminkan realiti komersial. Jika peratusan yang disenaraikan dalam Jadual C dibenarkan untuk digunakan sebagai peraturan yang tidak fleksibel, ia akan menyebabkan saraan penyelesau bergantung semata-mata pada saiz hartanah dan bukan pada merit kerja yang dilakukan — situasi yang tidak adil jika penyelesai harus mengendalikan

syarikat yang mempunyai sedikit atau tiada aset sama sekali (lihat perenggan 41).

(6) Peratusan yang disenaraikan dalam Jadual C tidak boleh digunakan sebagai hak yang utama. Jumlah besar yang dituntut oleh penyelesai sebagai saraannya, berdasarkan hanya peratusan yang diberikan dalam Jadual C, adalah tidak wajar. Mengesahkan amaun saraan yang dituntut tanpa justifikasi yang mencukupi bertentangan dengan prinsip utama iaitu keadilan dan kewajaran dan juga melangkau keperluan untuk penyelesai mengambil kira kerja sebenar yang telah dilakukannya (lihat perenggan 42).

(7) Mahkamah penggulungan tidak seharusnya bertindak sebagai 'yes man' atau rubber-stamp dalam mengesahkan apa-apa saraan yang dituntut oleh penyelesai. Walaupun tuntutan tertentu tidak dicabar atau telah diluluskan oleh COI, mahkamah mempunyai kewajipan untuk meneliti setiap dan satu per satu tuntutan untuk sanksi oleh penyelesai atau mana-mana permohonan oleh penyumbang minoriti untuk mengesahkan atau mengubah saraan penyelesau dan tidak sepatutnya membenarkan sebarang tuntutan yang tidak wajar atau tidak dapat dijelaskan (lihat perenggan 43).

(8) Berdasarkan keadaan dalam rayuan ini, mahkamah di bawah telah salah arah dalam pemakaian undang-undang dan telah melakukan kekhilafan yang serius dalam membuat dapatan bahawa penyelesau berhak untuk mengenakan saraan berdasarkan peratusan yang disenaraikan dalam Jadual C Jadual Kedual CWR tanpa penyelesai telah mengemukakan bahan yang mencukupi untuk mewajarkan jumlah yang telah dituntutnya. Oleh itu, perkara itu terpaksa dihantar semula ke Mahkamah Tinggi untuk pelaksanaan sepenuhnya percukaian untuk menentukan jumlah saraan yang adil dan munasabah yang perlu dibayar kepada penyelesai untuk kerja yang dilakukan (lihat perenggan 44–45).]

Cases referred to

Econ Corp Ltd (In Provisional Liquidation) (No 2), Re [2004] 2 SLR 264, HC (refd)

Lim Boon Chuan @ Lim Ban Huat v Wonderful Castle Sdn Bhd (in liquidation) & Anor [2019] 1 MLJ 270; [2020] 1 LNS 330, CA (refd)

Ong Kwong Yew & Ors v Ong Ching Chee & Ors and other appeals [2018] MLJU 2189; [2018] 1 LNS 2247, CA (refd)

Perumahan NCK Sdn Bhd v Mega Sakti Sdn Bhd [2005] 7 MLJ 389, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 268(2), 372
Companies Act 2016 ss 232(3), 479, 479(2)(a), (3), 619(2)
Companies (Winding-Up) Rules 1972 rr 142, 142(1), (2), (3), 195,

Second Schedule
Courts of Judicature Act 1964 s 16

Appeal from: Post Winding Up Petition No BA-28PW-5–02 of 2021 (High Court, Shah Alam)

Lai Chee Meng (with Joyce Chew Hooi Ying) (CM Lai & Partners) for the appellant.
Kirubakaran a/l Karthigasu (with Chong Hang Lim) (The Chambers of Cheong) for the respondent.

Che Mohd Ruzima JCA:

INTRODUCTION

[1] Dissatisfied with the committee of inspection's ('COI') resolution passed through a meeting held via WhatsApp meeting chatgroup messages to allow a remuneration amounting to RM9,296,304 to be paid to the liquidator on 18 January 2021, Emiprima Sdn Bhd ('the appellant') filed a notice of motion to the High Court under s 479 of the Companies Act 2016 ('the CA 2016') for the court to assess and vary the remuneration of the liquidator. The High Court dismissed the appellant's notice of motion with costs. Aggrieved by the decision, the appellant appealed.

THE BACKGROUND FACTS

[2] Wonderful Castle Sdn Bhd ('WCSB') was wound up on 14 August 2015 and one Datuk Tee Guan Pian was appointed as the liquidator of WCSB ('the liquidator').

[3] At the time of winding up, there were 11 contributories in WCSB, including the appellant who held a 10% share.

[4] Primarily, the assets of WCSB were three parcels of land, as follows:

(a) land held under GRN 46990, Lot No 1357 and 1359 Mukim Batu, Daerah Kuala Langat, Negeri Selangor measuring about 236,4878 hectares (Lots 1357 and 1359);

(b) land held under GRN 47648, Lot 480 Mukim Morib, Daerah Kuala Langat, Negeri Selangor, measuring about 100.8677 hectares (Lot 480); and

(c) land held under GRN 47993, Lot 894 and 1360, Mukim Morib, Daerah Kuala Langat, Negeri Selangor, measuring about 7.6915 hectares (Lots 894 and 1360).

Three parcels of land are collectively referred to as 'the said lands'.

[5] On 16 August 2019, the liquidator had filed forms of summons (encl 139) in the winding up court for sanction to distribute the said lands with the following distributions and orders:

(a) to distribute Lot 480 to the following contributories:

(i) Lim Boon Chuan (15%);

(ii) Ang Boon Kee (5%);

(iii) Ample Scope Sdn Bhd (7.5%); and

(iv) Tan Eng Soi (10%),
(collectively known as 'the 37.5% Contributories');.

(b) Lot 1357 and lot 894 be sold and the proceed be distributed to the 37.5% Contributories;

(c) RM2.5m be given to the liquidator as remuneration;

(d) RM3,050,000 be paid as costs to the 37.5% contributories; and

(e) the liquidator be exonerated from any further claims by all contributories and creditors of WCSB.

[6] The proposed distribution terms in encl 139 were accepted by almost all of the contributories, except for the appellant who had strongly opposed it. After considering all parties' submissions, the learned High Court judge ('the LHCJ') on 22 January 2020 dismissed encl 139 and, inter alia, held that there was nothing to substantiate RM2.5m as the remuneration of the liquidator. It was further held that the proposed settlement terms, which gave preferential treatment to the 37.5% contributories, contravened the pari passu principle.

[7] Thereafter, a public tender was conducted by the liquidator to sell off the said lands. Perkasa Temenggong Sdn Bhd turned out to be the highest bidder with bidding price of RM126m. Total realisation of WCSB's assets including the bidding price of the said lands were RM148,213,574.72.

[8] Then, the liquidator issued a notice of meeting dated 24 December 2020, giving notice to hold a creditors and contributories meeting on 15 January 2021. The agendas proposed by the liquidator, among others, include an agenda to approve the remuneration of the liquidator.

[9] Two days before the scheduled meeting, the liquidator issued a notice on 13 January 2021, postponing the meeting due to the implementation of the Movement Control Order. Thus, the meeting was postponed until further

notice. Despite the postponement notice, the liquidator sent an email to the COI members on 18 January 2021, informing them that the meeting of the COI would be carried out on the same day via WhatsApp meeting chatgroup messages.

[10] The said COI meeting seeks for the COI members to vote on various resolutions, including a resolution to approve the remuneration of the liquidator in the amount of RM9,296,304 and the closing time given to the members of the COI to vote was fixed on the same day, 18 January 2021, at 5pm.

[11] In the explanatory note attached to the notice of the meeting, the liquidator states that the remuneration in the amount of RM9,296,304 is computed based on Table C in the Second Schedule ('Table C') of the Companies (Winding-Up) Rules 1972 ('the CWR 1972'), taking into account the total amount of realised WCSB's assets, that is RM148,213,574.72.

[12] All members of the COI, except for the appellant, voted in favour of the resolution on the remuneration of the liquidator in the sum of RM9,296,304. Dissatisfied with the resolution passed on the remuneration, the appellant filed a notice of motion under s 479 of the CA 2016 for the winding up court to assess and vary the remuneration of the liquidator.

DECISION OF THE HIGH COURT

[13] The LHCJ noted that the liquidator has been appointed since 14 August 2015 and the remuneration is for the work done thereinafter until the present. the liquidator explained in the explanatory notes to the virtual COI meeting how the remuneration of the liquidator in the sum of RM9,296,304 is computed, that is, as tabulated in Table C. Majority members of the COI, except for the appellant, agreed and voted in favour of the liquidator which is clearly in accordance with s 479(2)(a) of the CA 2016.

[14] As to the remuneration, the liquidator is perfectly entitled to charge a certain percentage on the value of WCSB's assets realised as tabulated in Table C. It is not disputed that the amount of WCSB's assets realised is RM148,213,574.72. Based on the scale listed in Table C, the total amount of remuneration, inclusive of SST, chargeable by the liquidator is RM9,296,304 which certainly does not go against the principle of fairness and reasonableness.

THE APPEAL

[15] The appellant cited 13 grounds of appeal in the memorandum of appeal. However, learned counsel for the appellant raised only one main issue

in his submission, that is, whether the remuneration of the liquidator in the sum of RM9,296,304 is fair and reasonable despite being agreed upon by the majority members of the COI.

OUR DECISION

[16] The law on the salary or remuneration of a liquidator as provided under s 479 of the CA 2016 is clear. For ease of reference, we produce the whole provision of s 479 of the CA 2016 as follows:

> 479 Remuneration of liquidators in winding up by Court
>
> (1) An interim liquidator other than the Official Receiver shall be entitled to receive the salary or remuneration by way of percentage or otherwise as is determined by the Court.
>
> (2) A liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by —
>
> (a) an agreement between the liquidator and the committee of inspection, if any;
>
> (b) where there is no agreement or where there is no committee of inspection, a resolution passed at a meeting of creditors by a majority of not less than three-fourths in value and one-half in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted to vote, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or
>
> (c) if the agreement or determination under paragraph (a) or (b) fails, the Court.
>
> (3) Where the salary or remuneration of a liquidator other than the Official Receiver is determined in the manner specified in paragraph (2)(a), the Court may, on the application of a member whose shareholding represent in the aggregate not less than ten per centum of the issued capital of the company, confirm or vary the determination.
>
> (4) Where the salary or remuneration of a liquidator other than the Official Receiver is determined in the manner specified in paragraph (2)(b), the Court may, on the application of the liquidator or a member referred to in subsection (3), confirm or vary the determination.
>
> (5) Subject to any order of the Court, the Official Receiver when acting as a liquidator or interim liquidator of a company shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is prescribed.

[17] Besides that, there is also the CWR 1972 passed by the Rules Committee in exercise of the powers conferred by s 372 of the CA 1965 and s 16 of the Courts of Judicature Act 1964. Even though the CA 1965 has been

repealed, the CWR 1972 survive by virtue of the general transitional provisions under sub-s 619(2) of the CA 2016. The relevant Rules pertaining to the remuneration of a liquidator as provided in r 142 are as follows:

142 Remuneration of liquidator

(1) The remuneration of a liquidator, unless the Court shall otherwise order, shall be fixed by the committee of inspection, and shall be in the nature of a commission or percentage of which one part shall be payable on the amount realized, after deducting the sums (if any) paid to secured creditors (other than debenture holders) out of the proceeds of their securities, and the other part on the amount distributed in dividend.

(2) If the Official Receiver is of the opinion that the remuneration of a liquidator as fixed by the committee of inspection is unnecessarily large, the Official Receiver may apply to the Court and thereupon the Court shall fix the amount of the remuneration of the liquidator.

(3) If there is no committee of inspection the remuneration of the liquidator shall, unless the Court shall otherwise order, be fixed by the scale of fees and percentages for the time being payable on realizations and distributions by the Official Receiver as liquidator.

(4) This rule shall only apply to a liquidator appointed in a winding-up by the Court.

[18] To begin with, the law generally provides that a liquidator shall be entitled to receive such remuneration by way of percentage, or otherwise as determined by an agreement between the liquidator and the COI, or by a resolution passed by a majority at a meeting of COI, or if both fail, by the court as provided under sub-s 479(2) of the CA 2016.

[19] Notwithstanding the general provision, sub-s 479(3) of the CA 2016 specifically provides that if the remuneration of a liquidator is determined by an agreement between a liquidator and the COI as specified in para (2)(a), the contributories who owned not less than 10% shares of a company is given the right to apply to the winding up court to challenge the determination, and the court may confirm or vary the determination agreed upon by the COI. Besides that, the Official Receiver is also given the same right to apply to the court for determination if the Official Receiver is of the opinion that the remuneration of a liquidator as fixed by the COI is unnecessarily large as provided under sub-r 142(2) of the CWR 1972.

[20] Coming back to the present appeal, the undisputed background facts show that the liquidator had called a COI meeting to seek, inter alia, for the COI members to vote on a resolution to approve the remuneration in the sum of RM9,296,304 calculated based on the percentage listed in Table C. In the meeting, all members of the COI except the appellant, agreed to the proposed

A remuneration of the liquidator. Therefore, the liquidator is entitled to receive such remuneration as determined by an agreement between the liquidator and the COI as provided under para 479(2)(a) of the CA 2016.

B **[21]** However, consideration for the remuneration of the liquidator doesn't stop there. It is not disputed that the appellant who owned 10% shares in WCSB filed a notice of motion to the winding up court under sub-s 479(3) of the CA 2016 to ask the court to assess and vary the remuneration of the liquidator. Thus, the appellant has the right and locus to do so under the law.

C

[22] At the winding up court, the LHCJ made a crucial finding that the liquidator is perfectly entitled to charge the percentage as listed in para 2 of Table C as agreed in the COI meeting. His Lordship accepted that the total remuneration chargeable by the liquidator in the amount of RM9,296,304 is
D fair and reasonable and dismissed the appellant's motion to assess and vary the remuneration of the liquidator.

[23] The question is, whether the LHCJ is correct in accepting the determination of the remuneration which was merely based on the percentage
E listed in para 2 of Table C as agreed in the COI meeting without making any assessment?

[24] Before us, learned counsel for the liquidator argued that the basis of the remuneration based on percentage is common practice as evident by r 142(1)
F and (3) of the CWR 1972, especially when the remuneration of the liquidator is based on scale as approved by overwhelming majority of the COI. In contrast, learned counsel for the appellant argued that the overriding principle in the determination of the remuneration of the liquidator is 'fairness and reasonableness' even though the COI had passed a resolution to agree with the
G amount of the remuneration. He further argued that, apart from attaching a calculation computed in Table C to show how the amount of RM9,296,304 came about, the liquidator did not furnish any other particulars or materials to show the actual work that he had done throughout his tenure as a liquidator to justify such hefty sum as remuneration.

H

[25] First and foremost, it is undisputed that the majority of COI members agreed that the remuneration of the liquidator to be computed using Table C. For ease of reference, the whole provision of the Second Schedule of the CWR 1972 which includes Table C are as follows:

I

SECOND SCHEDULE

(Rule 195)

1. The fees mentioned in Table A shall be paid to Court.

2. The fees mentioned in Tables B and C shall be collected by the Official Receiver.

3. The fees mentioned in Table D shall be collected in stamps by the Official Receiver or the liquidator.

SCALE OF FEES

TABLE A

		$	c.
1.	Every petition	50	00
2.	Every bond with sureties	10	00
3.	Every subpoena or summons	2	00
4.	Every order of Court	10	00
5.	Every order made in Chambers	5	00
6.	Every affidavit filed other than proof of debt	2	00
7.	For taking an affidavit or an affirmation or a declaration for each person making the same	1	00
8.	Every exhibit to be marked	7	0
9.	Every application for search other than by the petitioner or liquidator	3	00
10.	Every office copy, each folio of 100 words or part	5	0
11.	On every application to the Court to approve a reconstruction or other scheme by which the affairs of the company are to be wound up otherwise than by realization and distribution of assets	100	00
12.	And in addition to item (11), on every order of Court approving such construction or scheme, a fee according to the following scale on the estimated assets of the company, viz:		
	(i) on the first $500,000 or fraction thereof	1/2 per	cent
	(ii) on the next $500,000 or fraction thereof	1/4 per	cent
	(iii) above $ 1,000,000 or fraction thereof	1/8 per	cent
13.	On an application under section 308	50	00

TABLE B

1.	Every inspection of any document lodged with the Official Receiver	10	00

2.	Every copy of or extract, each folio of 100 words or part		50
3.	Every application for a special bank account	20	00
4.	Every order of the Official Receiver for a special bank account	20	00
5.	Every application for search	10	00
6.	Every application to the Official Receiver for payment of money out of the Companies Liquidation Account:		
	(i) If the amount applied for does not exceed $10.00		50
	(ii) Where the amount applied for exceeds $10.00	1	00
	(iii) Where the amount applied for exceeds $100.00	5	00
7.	On every payment out of the Companies Liquidation Account	3	per cent

TABLE C

1.	Where the Official Receiver acts as provisional Liquidator only:		
	(i) In respect of each member, creditor or debtor	1	00
	(ii) On the value of the Company's assets as estimated in the statement of affairs:		
	(a) on the first $ 100,000 or fraction thereof	1	per cent
	(b) above $100,000	1/2	per cent
2.	Where the Official Receiver is the liquidator:		
	(i) In respect of each member, creditor or debtor		1
	(ii) Upon the total net assets realized:		
	(a) on the first $50,000 or fraction thereof	6	per cent
	(b) on the next $50,000 or fraction thereof	5	per cent
	(c) above $ 100,000	4	per cent
	(iii) Upon the amount available for distribution to Creditors or contributories and each time a distribution is made:		
	(a) on the first $50,000	4	per cent

(b) on the next $50,000	3	per cent	A
(c) above $100,000	2	per cent	
TABLE D			
1. Proof of Debt:			
(a) Fee for taking an affidavit or a statutory declaration	1	00	B
(b) Fee for making each exhibit referred to in an affidavit or a statutory declaration		70	
(c) Filing fee if claim is over $10	1	00	C
2. Fee on Special Proxy		100	

[26] Plainly, the Second Schedule of the CWR 1972 refers to r 195 in which the shoulder notes clearly stated the word 'Fees'. Subrule 195(1) provides that 'The fees payable in respect of the winding up of companies under these Rules are prescribed in the Second Schedule'. It is clearly stated that the fees mentioned in Table A shall be paid to the court, the fees mentioned in Tables B and C shall be collected by the official receiver and the only fees mentioned in Table D shall be collected in stamps by the official receiver or the liquidator. Thus, the percentage mentioned in para 2 of Table C applies as a fee when the Official Receiver acts as the liquidator. D E

[27] Notwithstanding the provision for 'fees' mentioned under the Second Schedule, sub-r 142(1) of the CWR 1972 provides that the remuneration of a liquidator, unless the court shall otherwise order, shall be fixed by the COI, and shall be in the nature of a commission or percentage of which one part shall be payable on the amount realized, and the other part on the amount distributed in dividend. In the meantime, according to sub-r 142(3), in the absence of a COI agreement, the liquidator's compensation shall, unless the court orders otherwise, be determined by the scale of fees and percentages now payable on realisations and distributions by the Official Receiver in the capacity of liquidator. According to the aforementioned subrule, the counsel for the liquidator asserted before us that the COI majority decision to compute the remuneration for the liquidator using the percentage listed in Table C of the Second Schedule was correct. F G H

[28] Reading the law and the rule harmoniously, we are of the opinion that the percentage listed in Table C can be used to compute the remuneration of a liquidator where there is no COI agreement on the remuneration or even the COI can agree that the computation of the remuneration can be based on the percentage listed in Table C. However, the law is not one sided when it comes to the determination of the remuneration of a liquidator. It is clear that the minority contributary who holds at least 10% shares in a company has the right I

to apply to the winding up court to question the fairness and reasonableness of the determined remuneration. With such a provision, we are of the considered view that once the winding up court is confronted with the minority contributory's objection to challenge the COI determination on the remuneration of the liquidator, the winding up court holds a statutory duty to examine whether the amount of the determined remuneration is in fact fair and reasonable. Thereafter its owes a duty to confirm or vary the determined remuneration.

[29] What happened here is, the LHCJ in the winding up court took a very simplistic approach in handling and deciding the appellant's application to assess and vary the remuneration of the liquidator. The LHCJ consider only two factors in his finding. First, the duration of the liquidator's appointment and second, the liquidator's explanatory note in the virtual COI meeting explaining how he uses the percentage listed in para 2 of Table C to compute the remuneration. Based on the two factors, the LHCJ found that the total claim in the amount of RM9,296,304 by the liquidator does not go against the principles of fairness and reasonableness.

[30] Apparently, the simplistic approach taken by the LHCJ in his decision which is now under appeal contradicted his own decision when he decided to dismiss the liquidator's application for the court's sanction to distribute WCSB's assets via forms of summons in encl 139. The LHCJ refused to give sanction and had this to say in his judgment:

> As regards to the remuneration charged, it is not in dispute that not less than 3/4 in value and 1/2 in number of the creditors present in person or by proxy (whose debt had been admitted) voted in favour of this remuneration. Be that as it may, the supporting affidavits prepared by the liquidator failed to provide any resolution passed by the creditors in support of the said 'agreed fees' of RM2.5m to the liquidator. As for the Contributories, there was no unanimous consent by all the Contributories to sanction such remuneration. Without having placed before me of all the relevant material in support of the 'agreed fees', I find it difficult to decide what amount of the remuneration claimed is fair and reasonable and justifiable that the liquidator is entitled to for the work which he had actually done.
>
> In the instant case, there is no concrete explanation or reason given why such amount of remuneration should be given to the liquidator. In short, without the supporting documents, I am unable to make a realistic assessment with an independent mind of the quantum claimed for work undertaken due to the liquidator even though there was overwhelming support from the creditors and contributories (except Emiprima Sdn Bhd) to accept the terms as set out in the Amended Annexure A.
>
> It is precisely for this reason this court is unable to depart from the approach taken in *Ong Kwong Yew & 6 Other v Ong Ching Chee & 4 Other* (Court of Appeal Civil Appeal No B-02(IM)-2135–10 of 2017 where the Court of Appeal held as follow:
>
> > What is apparent from a consideration of the law is that the legislation does not

> conceive of a situation where a liquidator simply 'helps himself' to compensation which the consent of all the relevant creditors, or contributories in the instant case. Although the majority contributories took no issue with the quantum claimed, the minority contributories took strong objection. Moreover, the fundamental basis for the removal application was that of bias on the part of the liquidator in favour of the majority contributories. Given the foregoing, the consent of the majority contributories did not, of itself, entitle the liquidator to contend that the payments he made to himself were approved.
>
> Having considered the totality of the circumstances, I hereby, refused to sanction the 'agreed fees' of RM2.5m in the absence of a full particulars or records of the work undertaken to substantiate his claim for the said remuneration. Regret to say that the material was given to this court was woeful inadequate to meet the standard to enable me to make a realistic assessment of the remuneration due for work done.

See the LHCJ's decision as reported in *Lim Boon Chuan @ Lim Ban Huat v Wonderful Castle Sdn Bhd (in liquidation) & Anor* [2019] 1 MLJ 270; [2020] 1 LNS 330.

[31] We observed that there is a similar fact and situation between the liquidator's application for the court's sanction via encl 139 and the COI agreement to pass a resolution to approve the remuneration of the liquidator in the amount of RM9,296,304. The similar fact in both situations is that, the majority of the COI members except for the appellant agreed to the amount claimed by the liquidator. Be that as it may, the LHCJ had taken a very different approach in handling and deciding those similar facts and situations.

[32] In the case of encl 139, the LHCJ referred to the remuneration claimed in the amount of RM2.5m by the liquidator as 'agreed fees' but still refused to allow the sanction upon objection by the appellant on the reason that without the supporting documents, he is unable to make a realistic assessment with an independent mind on the quantum prayed by the liquidator even though there was overwhelming support from the members of the COI. Ironically, in the case of the liquidator's claim for remuneration in the amount of RM9,296,304, the same LHCJ refused the appellant's application to assess and vary the determined remuneration on a simple reason that the majority members of COI agreed and voted in favour of the remuneration of the liquidator even though without any justification or supporting documents. In fact, the LHCJ made a specific finding that the liquidator is perfectly entitled to charge the percentage listed in Table C without giving any reason other than the determination was agreed by the COI. The LHCJ is inconsistent in his decisions, akin to an action of changing the goal post in deciding the two similar facts and situations.

[33] It is trite law that, once the winding up court is confronted with the minority contributory's objection via a notice of motion filed under sub-s

479(3) of the CA 2016 to challenge the OCI determination on the remuneration of the liquidator, the winding up court holds a statutory duty to examine whether the amount of the determined remuneration is in fact fair and reasonable. The duty to examine and determine whether a remuneration is fair and reasonable had to be discharged judiciously.

[34] As to the consideration of a fair and reasonable remuneration, this court in *Ong Kwong Yew & Ors v Ong Ching Chee & Ors and other appeals* [2018] MLJU 2189; [2018] 1 LNS 2247 (*Ong Kwong Yew*'s case) made the following observation:

> [49] This last-mentioned case of *Perumahan NCK Sdn Bhd v Mega Sakti Sdn Bhd* (above) sets out comprehensively the law in relation to s 232(3) and r 142(3) of the Companies (Winding-Up) Rules 1972. It examines when and how a liquidator is to be paid particularly where the liquidation is protracted and considers the parties who can be heard at the liquidators' application for remuneration, and the principles to be applied when determining the remuneration of liquidators.
>
> [50] What is apparent from a consideration of the law is that the legislation does not conceive of a situation where a liquidator simply 'helps himself' to compensation without the consent of all the relevant creditors, or contributories in the instant case. Although the majority contributories took no issue with the quantum claimed, the minority contributories took strong objection. Moreover, the fundamental basis for the removal application was that of bias on the part of the liquidator in favour of the majority contributories. Given the foregoing, the consent of the majority contributories did not, of itself, entitle the liquidator to contend that the payments he made to himself were approved.

For better understanding, the principles in determining remuneration for the liquidator as decided by Ramly Ali J (as he then was) in *Perumahan NCK Sdn Bhd v Mega Sakti Sdn Bhd* [2005] 7 MLJ 389 which was referred to by this court in *Ong Kwong Yew*'s case are as follows:

> 29. The Companies Act 1965 clearly provides for the payment of remuneration of liquidators and empowers the court to fix the amount if there is a failure to do so by the committee of inspection or the creditors. In determining the remuneration, the court must start from the position that the liquidator is entitled to reasonable remuneration (see *Re Wun Ross & Co*).
>
> 30. The remuneration to which the liquidators are entitled is for the work which was actually done. In the ordinary course, the process of fixing of remuneration comes down essentially to ensuring that the work upon which the claim was based was work undertaken in the course of administration; and that the amount claimed for having done that work is fair and reasonable reward for it. Therefore, the burden of proof lies with the liquidators to show that the remuneration claimed is justifiable.
>
> 31. The benchmark in the assessment process is fairness and reasonableness. The court need not accept what is submitted at face value but will carefully scrutinise the facts placed before it, in deciding what aspect of the remuneration claimed is reasonable and justifiable. The court will not blindly accept that what is said as done is done.

32. In order to discharge that burden the liquidators in the present case have filed an affidavit in support in which they have given evidence of the work that were performed by the liquidators and the staff assisting the liquidators in administering the assets of the respondent.

[35] We also like to refer to the Singapore High Court decision in *Re Econ Corp Ltd (In Provisional Liquidation) (No 2)* [2004] 2 SLR 264 (*Re Econ*'s case) where Justice VK Rajah has spelt out the guiding principles to be taken into account in determining a fair and reasonable remuneration for a liquidator. The guidelines as stated in *Re Econ*'s case can be summarised as follows:

(a) valued contribution, what difference the liquidator has made to the matter;

(b) time spent, the importance will vary from case to case, from being a possibly critical factor in one case to just another matter for consideration in another;

(c) the rates, in the absence of acceptable guidelines it cannot be accepted at face value and the rates to be determined as fair and reasonable by the court depends on complexity or otherwise of the case;

(d) the assistance, rendered by the employees from the liquidator's firm subject to strict proof;

(e) the scope of work, it is important to understand the functions and responsibilities of the liquidator;

(f) the disbursement, it must have some measure of restraint and discipline on how the items are recouped and accounted for; and

(g) in summary, it remains open for the court in any matter to decide whether the basis for the remuneration ought to be on a time basis, a realisation basis or an all-encompassing basis absorbing all or a combination of the criteria identified, and the guidelines are not immutable rule.

[36] As clearly mentioned in the summary of *Re Econ*'s case, the guidelines are not conclusive. There are other factors that can be considered in determining the fair and reasonable remuneration of a liquidator. As to the burden of proof, it is trite law that the burden is always on a liquidator to prove all relevant factors in determining a fair and reasonable remuneration.

[37] Based on the principles enunciated, it is clear that the prime consideration in determining the remuneration of a liquidator is that, it should be fair and reasonable. To determine a fair and reasonable remuneration, the court must ensure that the work upon which a claim is made must be the work undertaken or done in the course of the administration of the wound up

company. In the determination process, the court has to consider all relevant factors involved, and need not accept what is submitted at face value but is duty bound to scrutinise all facts placed before it. Along the process, the burden to prove a fair and reasonable amount of remuneration lies on a liquidator.

[38] As to the mode or method to be considered by the winding up court in determining the remuneration of a liquidator, this court in *Ong Kwong Yew*'s case held that there are three methods to be considered and any of the chosen methods is subject to the overriding principle of fairness and reasonableness. The relevant excerpt of the decision is as follows:

> [110] The court concluded by stating that it remains open for the court in any matter to decide on the optimum mode of assessing fair remuneration, albeit on a time basis, a realisation basis or an all-encompassing basis where all of the said criteria are considered. However, whatever the basis adopted, it must be characterised by fairness and reasonableness. It was also emphasised that determination by the court ought to be a matter of last resort, invoked only when no agreement with the creditors can be reached. The decision appears, with respect, to set out comprehensively the approach to be adopted in relation to the assessment of the quantum of remuneration for them.

[39] In the present appeal, the liquidator presented his claim based on a calculation sheet calculated using the percentage listed in para 2 of Table C before the COI. In defending his claim against the appellant's application before the winding up court, the liquidator averred that the professional remuneration in carrying out liquidation works ought to be charged based on the percentage listed in Table C of the total net assets realised. For the works done, the liquidator averred that he has been appointed since 14 August 2015, hence the remuneration passed by the COI is inclusive of all work done or carried out throughout the period of 2015 until 2021. The work done is described as onerous and time consuming as voluminous records have to be kept and perused to discharge the liquidator's duty. See paras 32 and 39 of the liquidator's affidavit in reply at pp 67–69 of encl 6.

[40] Apparently, besides the duration of tenure as a liquidator for WCSB and the generalised description of the work done, there is no other justification put forward by the liquidator to justify the usage of the percentage listed in Table C to compute the remuneration. We find that, without any detailed explanation or sufficient proof to justify the enormous amount of RM9,296,304, the liquidator's claim, which was calculated based on the percentage tabulated in Table C is completely disproportionate.

[41] On the usage of the percentage in calculating the remuneration of the liquidator, we find assistance in the decision of *Re Econ*'s case. At pp 280 and 281, it was observed that:

> [42] The official receiver when acting as a liquidator is entitled to levy fees pursuant to the Fees (Winding Up of Companies) Order ('Order') (Cap 106, O 35, 2001 Rev Ed). This is fixed on a percentage basis to the realised assets and distributions. Given that it is incongruous with commercial reality, this Order is of little assistance in fixing the remuneration of private insolvency practitioners and should not be used as a guide. While s 268(2) of the Act does indeed contemplate a liquidator's remuneration being fixed on a percentage basis, the fact remains that most jurisdictions have, quite correctly, rejected as being unfashionable any notion of rewarding insolvency practitioners on a percentage basis tied to realisation. A scale fee of this nature, despite its statutory sanction, would be arbitrary if applied as an inflexible rule, and will not fairly and reasonably remunerate insolvency practitioners. It could, arguably, be appropriate to apply such scale fees in matters where the principal task of the insolvency practitioner is to dispose of assets. He may then be viewed as a quasi-realtor. Even in such instances the issue arises as to whether it would be more economical to sub-contract this role to a realtor — the litmus test being expediency and economy in the particular circumstances of each such case.

Based on the above observation, we agree with learned counsel for the appellant's contention that the liquidator's dependence on the percentage tabulated in Table C would produce an arbitrary result which is impractical and could hardly produce a fair remuneration. It could produce a scanty or unnecessarily large amount of remuneration that does not reflect commercial reality. If the percentage listed in Table C is allowed to be used as an inflexible rule, it will cause the remuneration of the liquidators to be solely dependent on the size of the estate and not on the merits of the work done, an unfair situation when a liquidator has to handle a company that has a little or no assets at all.

[42] Therefore, we find that the usage of the percentage listed in Table C should not be allowed as a matter of right. In this appeal, the enormous amount of RM9,296,304 claimed by the liquidator as a remuneration which was totally dependent on the usage of the percentage listed in Table C is unwarranted. Confirming the remuneration claimed for by the liquidator without sufficient justification would go against the overriding principle of fairness and reasonableness, and further bypass the requirement for the liquidators to properly account for their actual work done. As an officer of the court who is entrusted to deal with WCSB's property, the liquidator holds a fiduciary duty to account for all proceeds acquired from the assets of the company. In implementing the duty, the liquidator should be transparent and accountable in all aspects of insolvency practice.

[43] As for the winding up court, it should not at any time act as a 'yes man' or as a rubber-stamp in confirming any remuneration claimed by a liquidator. Even though the particular claim is unchallenged or has been predetermined by the COI, it will not in any way absolved the court's duty to scrutinise carefully each and every claim for sanction by a liquidator or the application to confirm

or vary the remuneration of a liquidator by the minority contributories that come before it. In short, the court will be shirking its responsibilities if it allows an unjustifiable or unexplainable claim by a liquidator.

CONCLUSION

[44] Having considered the totality of the circumstances of this appeal, we are of the considered view that the LHCJ misdirected himself in applying the law and committed a serious error in his finding that the liquidator is perfectly entitled to charge the percentage listed in Table C of the Second Schedule of the CWR 1972. Thus, we find merit in the appellant's appeal which warrants appellate intervention. We allow the appellant's appeal and set aside the High Court judgment with cost.

[45] As for the remuneration of the liquidator, we find that there is no sufficient material put forward by the liquidator before the High Court to justify the amount claimed. We have no choice but to remit the matter to the High Court for a full exercise of taxation to determine a fair and reasonable amount of remuneration to be given to the liquidator for work done.

[46] As for costs, we awarded a sum of RM15,000 here and below to be paid to the appellant subject to allocator.

Order accordingly.

Reported by Ashok Kumar